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Contracts--Contracts for Benefit of Third Party--Trusts--Testamentary Dispositions (In re McCabe's Estate, 176 Misc. 286 (1941))

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such accord as the common-law ruling prevails unless the accord comes up to the specifications of the statute.

A. S. C.

CONTRACTS — CONTRACTS FOR BENEFIT OF THIRD PARTY — TRUSTS—TESTAMENTARY DISPOSITIONS.—This is a proceeding by an executor to render and settle an account. Decedent made a loan of five hundred dollars, on collateral security, to her executor and his wife, as evidenced by a note and an agreement. The agreement provided that in the event of decedent's death before satisfaction of the debt, the note with the collateral security was to revert to the named son of the executor and his wife. The evidence shows that decedent had previously opened a savings account in her name in trust for said son of the executor and his wife and on the date of the loan had withdrawn five hundred dollars from this account, which was presumably the sum loaned to the executor and his wife the same day. Decedent died before payment of the debt and the executor has purported to indorse and deliver the note, together with the collateral security, to his son without having made any effort to collect the sum due. Decedent's sole legatee objects to said transfer by reason of the admitted failure of the executor to make any effort to collect the debt. *Held,* objections sustained. The transfer of the note and the accompanying collateral security to the son was improper and the executor was guilty of culpable neglect in failing to collect payment on the note from his co-maker, if not from himself, since the co-maker was jointly and severally liable thereon [1] and proof shows resources ample for payment. *In re McCabe's Estate,* 176 Misc. 286, 27 N. Y. S. (2d) 127 (1941).

The accountant's contention that the agreement constituted a contract for the benefit of a third person [2] and enforcible by such third person [3] had no applicability under the present facts.[4] Contracts made for the benefit of third persons are executed contracts, where the promisee is unable to revoke or control the promisor in the ful-

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[1] NEGOTIABLE INSTRUMENTS LAW §§ 55, 110. (*See also, id.* § 36, which reads in part: "* * * (7) Where an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon.")

[2] 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 347; WHITNEY, CONTRACTS (3d ed. 1937) § 76.

[3] Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187 (1918); Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58, 5 N. Y. St. Rep. 800 (1887); Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20 (1884); Little v. Banks, 85 N. Y. 258, *aff'g,* 20 Hun 143 (1881); Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521 (1870); Lawrence v. Fox, 20 N. Y. 268 (1859).

[4] McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), *reargument denied,* 282 N. Y. 800, 27 N. E. (2d) 207 (1940).

fillment of the promise.[5] Such a beneficiary contract is entirely incompatible with attempts to make testamentary dispositions [6] and assumes that all three parties are alive.[7] Since the gift did not take effect as a completed and executed transfer to the executor's son (donee), either legally or equitably, during the life of the decedent (donor), it is a testamentary disposition and enforcible only when made by a valid will.[8] The test seems to be whether the donor intended to create in the beneficiary rights *in praesenti* or rights *in futuro*.[9]

The tentative trust presumptively [10] created by the opening of the savings account by the decedent did not become a fixed and absolute trust by reason of decedent's statement that she was making the loan from the funds of the executor's son.[11] Such statement is not the unequivocal declaration required [12] to transfer tentative rights of

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[5] *Ibid.*; 2 WILISTON, CONTRACTS (Rev. ed. 1936) § 396 ("* * * the donee beneficiary acquires a right at once upon the making of the contract and that right becomes immediately indefeasible.").

[6] A testamentary disposition of property is one which is not to take effect unless the grantor dies; nor until that event. Diefendorf v. Diefendorf, 8 N. Y. Supp. 617, 56 Hun 639 (1890), *aff'd*, 132 N. Y. 100, 30 N. E. 375 (1892); *cf.* Ga Nun v. Palmer, 159 App. Div. 86, 144 N. Y. Supp. 457, 11 Mills 548 (1913); *see also* 28 C. J. 624, § 11(E); *id.* § 43.

[7] See note 4, *supra*.

[8] DECEDENT ESTATE LAW § 21; Rankin v. Donovan, 46 App. Div. 225 (1899), *aff'd*, 166 N. Y. 626, 60 N. E. 1112 (1901); 28 C. J. 624, § 11(E); *id.* 648, § 43(2).

[9] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 50 Am. Rep. 41 (1885); Townsend v. Rackham, 143 N. Y. 516, 519, 38 N. E. 731 (1894); *In re* Vaughan's Estate, 145 Misc. 332, 260 N. Y. Supp. 197 (1932); McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. (2d) 102 (1939), *reargument denied*, 282 N. Y. 800, 27 N. E. (2d) 207 (1940).

[10] The New York decisions are uniformly agreed that it necessitates more than the mere opening of a trust account to establish conclusively an irrevocable trust. Thus, in *Mabie* v. *Bailey*, 95 N. Y. 206, *aff'g*, 12 Daly 60, 16 W. Dig. 557 (1884), the court declares (at p. 210): "The character of such a transaction, as creating a trust, is not conclusively established by the mere fact of the deposit". In *Beaver* v. *Beaver*, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403 (1889), the court writes (at p. 428): "No * * * trust * * * can be implied from a mere deposit by one person in the name of another." *See also* headnote to *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 49 Am. St. Rep. 641, 32 L. R. A. 373 (1895), cited in full in *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711 (1904).

[11] *Cf.* Tiber v. Heller, 173 Misc. 333, 17 N. Y. S. (2d) 59 (1939); *In re* Kelly's Will, 151 Misc. 277, 271 N. Y. Supp. 457 (1934); *In re* Mannix' Estate, 147 Misc. 479, 264 N. Y. Supp. 24 (1933).

[12] Matter of Totten, 179 N. Y. 112, 125, 71 N. E. 748, 70 L. R. A. 711 (1904), wherein VANN, J., writes: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created *as to the balance on hand at the death of the depositor.*" (Italics mine.)

a beneficiary into present vested rights. To accomplish such resultant effect, the depositor must complete "the gift in his lifetime, either by acts sufficient to constitute a valid gift *inter vivos,* or to effect the erection of a present trust",[13] thus necessitating such unambiguous conduct as plainly to imply that the depositor intended to divest himself of his interest in the property and hold it thereafter for the named beneficiary. The decision rests on the well-established rule that a gift of property to take effect after the donor's death, the donor in the meanwhile retaining control and dominion over the property, cannot be sustained since it is a testamentary disposition.[14] The court has placed great reliance on the recent cases of *In re Vaughan's Estate* [15] and *McCarthy* v. *Pieret,*[16] the latter case following the rule of *Townsend* v. *Rackham.*[17]

M. F.

CRIMINAL LAW—MURDER IN THE FIRST DEGREE—EVIDENCE—CORROBORATION OF ACCOMPLICE'S TESTIMONY.—The defendants, Strauss and Goldstein, were convicted of first degree murder under the New York penal law.[1] The indictment charged that they "willfully and feloniously and of malice aforethought, killed Irving Feinstein by strangling him with a rope and setting fire to his body." Abraham Reles, who admitted taking part in the crime, described a sequence of events which led up to the death of the victim. The evidence showed a deliberate and premeditated plan to commit murder. Reles admitted having committed perjury at a previous trial. Both defendants appeal on the ground that the judge's charge to the jury as to what was required by statute [2] as corroborative evidence of the testimony of an accomplice, in order to convict the defendants constituted reversible error. The defendant, Strauss, further contends that he was deprived of his constitutional rights [3] by being forced to trial without being afforded a judicial inquiry and determination as to his ability to comprehend the charge against him; to confer with his counsel; and to make his defense. *Held,* conviction affirmed. Although there were minor inaccuracies in the charge when it is con-

[13] WINGATE, S., in *In re* Vaughan's Estate, 145 Misc. 332, 260 N. Y. Supp. 197 (1932).
[14] See note 6, *supra.*
[15] 145 Misc. 332, 260 N. Y. Supp. 197 (1932).
[16] See note 4, *supra.* For a thorough discussion of this case see 53 HARV. L. REV. 1060; 26 CORN. L. Q. 130-3; 38 MICH. L. REV. 900; 24 MINN. L. REV. 1009; 18 CHI-KENT REV. 417.
[17] 143 N. Y. 516, 38 N. E. 731 (1894).

[1] N. Y. PENAL LAW §§ 1044, 1045.
[2] N. Y. CODE OF CRIM. PROC. (1882) § 399.
[3] U. S. CONST. AMEND. XIV, § 1; N. Y. CONST. art. I, § 6.